March 14 1872
Sunberry v Thurston
Mr Justice Clifford

Mr. Justice Clifford.

SUPREME COURT OF THE UNITED STATES.

No. 578.

THE UNITED STATES, PLAINTIFFS,

vs.

JAMES WILLIAM AVERY, ROBERT RIGGINS, ET AL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Division of Opinion

FILED JANUARY 5, 1872.

Desmond
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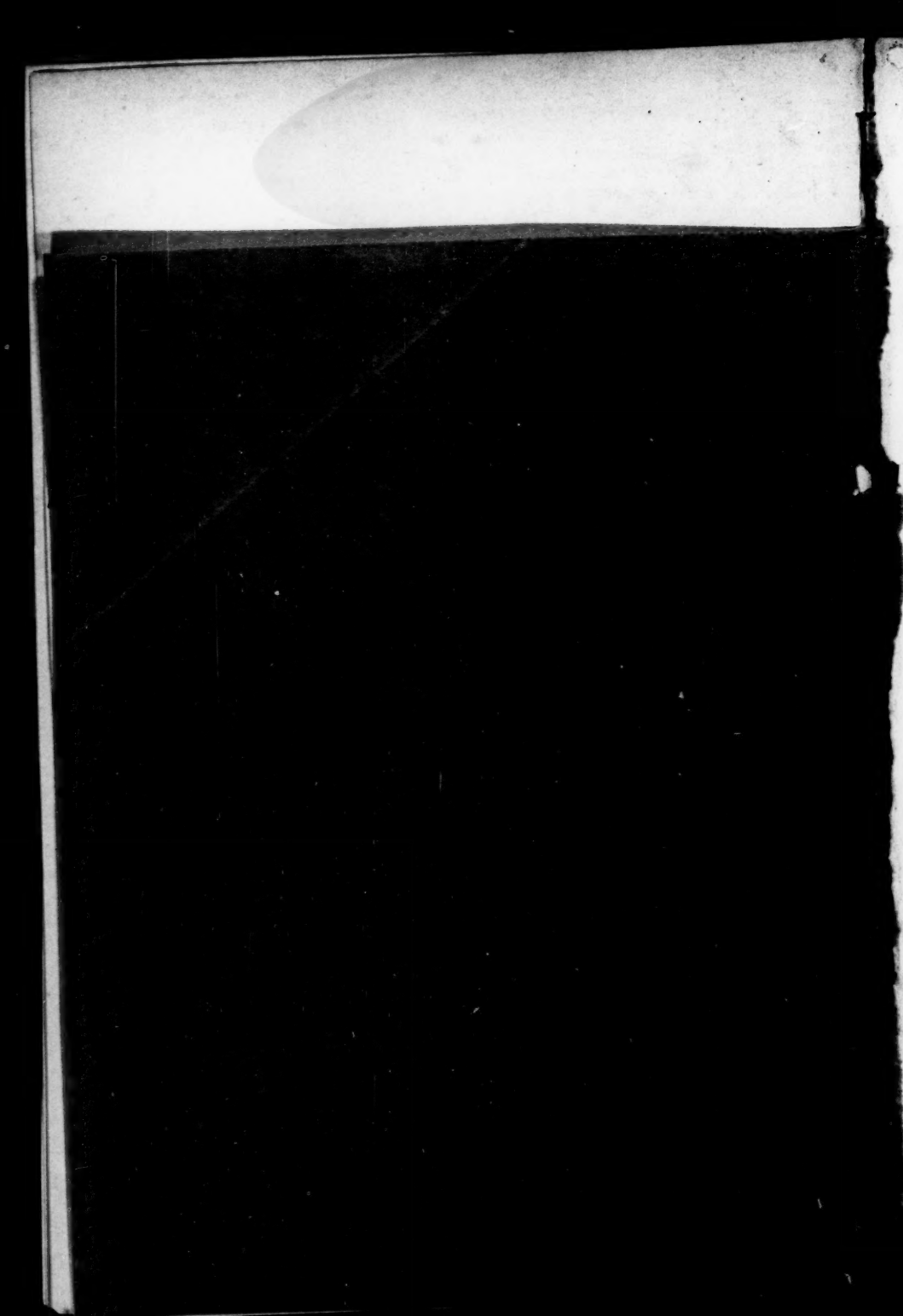

1 UNITED STATES OF AMERICA,
South Carolina District, Fourth Circuit:

At a circuit court of the United States, begun and held at Columbia, for the district of South Carolina, on Monday the twenty-seventh day of November, in the year of our Lord one thousand eight hundred & seventy-one, and in the ninety-sixth year of American independence—

Present, the Honorable Hugh L. Bond and the Honorable Geo. S. Bryan.

THE UNITED STATES
vs.
JAMES WILLIAM AVERY, ROBERT RIGGINS, and others. } Indictment.

This was an indictment for a conspiracy under the provisions of the act of Congress, entitled, "An act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," approved May 31, 1870.

2 The defendant Robert Riggins, by his counsel, moved the court to quash the said indictment and each & every count thereof.

After argument upon the motion to quash said indictment, it occurred as a question—

1. Whether the court has jurisdiction to inquire and find whether the crime of murder has been committed, as set forth & charged, in the latter portions of the second and fourth counts of said indictment, in order to ascertain the measure of punishment to be affixed to the offences against the United States, charged in the former portions of the said second and fourth counts.

2. Whether the right to keep and bear arms is a right granted and secured by the Constitution of the United States, so as to support the third count of said indictment, and render the offence therein charged cognizable in this court.

On which questions the opinions of the judges were opposed.

3 Whereupon, on motion of the defendant Robert Riggins, by his counsel, that the points on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court, to be finally decided:

It is ordered that the foregoing state of the pleadings and the questions on which the disagreement of opinion hath happened, which is made under the direction of the judges, be certified, according to the request of the defendant, by his counsel, and the law in that case made and provided.

And it is further ordered that a copy of said indictment, and of the said motion to quash the same, be also made part of the transcript certifying said questions.

(Signed) HUGH L. BOND,
Judge of the Circuit Court for the 4th Circuit, & Dist. of South Carolina.

(Signed) GEO. S. BRYAN,
U. S Judge Dis. of So. Ca.

20TH DEC., 1871.

4 I, Daniel Horlbeck, clerk of circuit court of the United States for S. C., do hereby certify that the three preceeding pages do con-

tain a true and correct copy of the original order on file and recorded in journals of said court.

Witness my hand & seal of said court, at Columbia, S. C., this 22 Dec., 1871.

[SEAL.]

DAN'L HORLBECK,
C. C. C. U. S. for So. Ca

(Indorsed:) U. S. circuit court for S. C. Nov'r T., 1871. U. States vs. Ja's W'm Avery et al. Certificate of division. Filed 21 Dec., 1871. Stanberry & Johnson, for appeal.

5 4th circuit, dist. of So. Carolina.

THE UNITED STATES
vs.
JAMES WILLIAM AVERY & OTHERS. } Indictment for conspiracy.

The said Robert Riggins, one of the defendants in the above case, moves the court to quash the second & fourth counts of said indictment, and for cause shows that the crime of murder, charged in each of said counts, is not alleged as an overt act of the conspiracy, or as committed in pursuance thereof, but as a distinct act or crime against the peace, &c., of South Carolina, and as such is not cognizable by or within the jurisdiction of this court, but is exclusively cognizable by the State court having jurisdiction of such crimes in said county of York. Also to quash the 3rd count of said indictment, because the offense
6 therein set forth & charged against the right & privilege to keep & bear arms, is not cognizable by or within the jurisdiction of this court. Wherefore, for the above & other errors in said counts, the said defendant prays that the same be quashed & held for naught.

(Signed) JAMES F. HART,
Att'y for Def't R. Riggins.

I, Daniel Horlbeck, clerk of circuit court of the United States for S. C., do hereby certify that the one and a half preceeding pages do contain a true & correct copy of the original motion to quash second & fourth counts of indictment on file and recorded in journals of said court.

Witness my hand & seal of said court, at Columbia, S. C., this 22 Dec'r, 1871.

[SEAL.]

DAN'L HORLBECK,
C. C. C. U. S. for S. Caro.

7 (Indorsed:) U. S. C. court for S. C. Nov'r T., 1871. The U. States vs. Ja's W'm Avery et al. Motion to quash indictment. Filed 11 Dec., 1871. Stanberry & Johnson, for def'ts.

8 [Form No. 1.—Act May 31, 1870, sec. 6.]

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

At a stated term of the circuit court of the United States, began and holden at Columbia, in said district, on the fourth Monday of November, A. D. 1871, the grand jurors of the United States in and for said district, to wit:

upon their several and respective corporal oaths do present that James

William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of York County, in the State of South Carolina, at York County, in said district, and within the jurisdiction of this court, on the sixth day of March, A. D. 1871, unlawfully did conspire together with intent to violate the first section of the act entitled "An act to enforce the rights of the citizens of the United States to vote in the several States of this Union, and for other purposes," approved May 31, 1870, by unlawfully hindering, preventing, and restraining divers male citizens of the United States of African descent, above the age of 21 years, qualified to vote at any election by the people in said county, district, and State, from exercising the right and privilege of voting, and by other unlawful means, not allowing them, the said male citizens, to vote at an election by the people, to be held on the third Wednesday of October, A. D. 1872, within the county, district, and State aforesaid, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States.

(Indorsed:) 1st count.

9 [Form No. 2.—Act May 31, 1870, sec. 6 & 7.]

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

At a stated term of the circuit court of the United States, began and holden at Columbia, in said district, on the fourth Monday of November, A. D. 1871, the grand jurors of the United States in and for said district, to wit:

upon their several and respective corporal oaths do present that James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of York County, in the State of South Carolina, at York County, in said district, and within the jurisdiction of this court, on the sixth day of March, A. D. 1871, unlawfully did conspire together with intent to violate the first section of the act entitled "An act to enforce the rights of the citizens of the United States to vote in the several States of this Union, and for other purposes," approved May 31, 1870, by unlawfully hindering, preventing, and restraining divers male citizens of the United States of African descent, above the age of 21 years, qualified to vote at any election by the people in said county, district, and State, from exercising the right and privilege of voting, and by other unlawful means, not allowing them, the said male citizens, to vote at an election by the people, to be held on the third Wednesday of October, A. D. 1872, within the county, district, and State aforesaid, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present that said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon

Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, and others, to the jurors aforesaid unknown, on the day and year aforesaid, at the county and district aforesaid, and within the jurisdiction of this court, in the act of committing the offence aforesaid as aforesaid set forth and alleged, in & upon one Jim Willaims, alias Jim Rainey, in the peace of God & the State of South Carolina then & there being, feloniously, willfully, & of their malice aforethought, did make an assault, and the said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, & others, to the jurors aforesaid unknown, a certain rope about the neck of the said Jim Williams, alias Jim Rainey, then & there feloniously, wilfully, & of their malice aforethought, did fix, tie, & fasten, & that the said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, & others, to the jurors aforesaid unknown, with the rope aforesaid so as aforesaid fastened on & about the neck of him, the said Jim Williams, alias Jim Rainey, him, the said Jim Williams, alias Jim Rainey, then & there feloniously, wilfully, & of their malice aforethought, did choke, suffocate, & strangle, of which said choking, suffocating, & strangling, he, the said Jim Williams, alias Jim Rainey, then & there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, and others, to the jurors aforesaid unknown, him, the said Jim Williams, alias Jim Rainey, then & there, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill & murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Carolina.

(Indorsed:) 2nd count.

[Act May 31, 1870, sec. 6.]

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

At a stated term of the circuit court of the United States, began and holden at Columbia, in said district, on the fourth Monday of November, A. D. 1871, the grand jurors of the United States in and for said district, to wit:

upon their several and respective corporal oaths do present that James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, together with divers other evil-disposed persons to the jurors aforesaid as yet unknown, late of York County, in the State of South

Carolina, at York County in said district, and within the jurisdiction of this court, on the sixth day of March, A. D. 1871, unlawfully did conspire together with intent to injure, oppress, threaten and intimidate Jim Williams, alias Jim Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the Constitution of the United States, to wit, the right to keep and bear arms, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States.

D. T. CORBIN,
U. S. District Attorney.

(Indorsed:) 3rd count.

13

14 [Act May 31, 1870, sec. 6 & 7.]

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

At a stated term of the circuit court of the United States, began and holden at Columbia, in said district, on the fourth Monday of November, A. D. 1871, the grand jurors of the United States in and for said district to wit:

upon their several and respective corporal oaths do present that James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of York County, in the State of South Carolina, at York County in said district, and within the jurisdiction of this court, on the sixth day of March, A. D. 1871, unlawfully did conspire together with intent to injure, oppress, threaten, and intimidate Jim Williams, alias Jim Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the Constitution of the United States, to wit, the right to keep and bear arms, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further present that said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLean, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, and others, to the jurors aforesaid unknown, on the day and year aforesaid, at the county and district aforesaid, and within the jurisdiction of this court, in the act of committing the offence aforesaid, as aforesaid set forth and alleged, in and upon one Jim Williams, alias Jim Rainey, in the peace of God and of the State of South Carolina, then and there being, feloniously and of malice aforethought, did make an assault, and that the said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, and others, to the jurors aforesaid unknown, a certain

15 (U. S. district attorney) rope about the neck of the said Jim Williams, alias Jim Rainey, then & there feloniously, wilfully, & of their malice aforethought, did fix, tie, & fasten, & that the said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, and others, to the jurors aforesaid unknown, with the rope aforesaid, so as aforesaid fastened on & about the neck of him, the said Jim Williams, alias Jim Rainey, him the said Jim Williams, alias Jim Rainey, then & there feloniously, wilfully, & of their malice aforethought, did choke, suffocate, & strangle, of which said choking, suffocating, & strangling he, the said Jim Williams, alias Jim Rainey, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, and others, to the jurors aforesaid unknown, him, the said Jim Williams, alias Jim Rainey, then & there in manner & form aforesaid, feloniously, wilfully, & of their malice aforethought, did kill & murder, contrary to the form of the statute in such case made & provided & against the peace & dignity of the State of South Carolina.

(Indorsed:) 4th count.

16 And so the jurors aforesaid, upon their oaths aforesaid, do further present that James William Avery, James Rufus Bratton, Chambers Brown, Alonzo Brown, Robert Riggins, Rufus McLain, Napoleon Miller, William Johnson, Pinckney Caldwell, Robert J. Caldwell, Robert Dixon Bigham, John S. Bratton, Harvey Gunning, Bascom Kennedy, Holbrook Good, together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of York County, State of South Carolina, at York County in said district, and within the jurisdiction of this court, on the sixth day of March, A. D. 1871, unlawfully did conspire together with intent to injure, oppress, threaten, & intimidate Jim Williams, alias Jim Rainey, a male citizen of the United States of African descent, above the age of twenty-one years, qualified & enti-
17 tled by law to vote at any election by the people in said county, district, and State—because he, the said Jim Williams, alias Jim Rainey, did exercise the right & privilege of voting at an election by the people in said county, district, & State, held on the third Wednesday of October, A. D. 1870—contrary to the act of Congress in such case made & provided and against the peace and dignity of the United States.

(Indorsed:) 5th count.

18 (Indorsed:)

United States of America, South Carolina district. U. S. circuit court. United States versus James William Avery et als. Conspiracy, &c., against Jim Williams, alias Jim Rainey. Indictment. D. T. Corbin, U. S. dist. att'y.

A true bill.

BENJ. F. JACKSON,
Foreman.

9TH DEC., 1871.

Case called up 11 Dec'r, 1871, & case certified to Supreme Court. Division of opinion. Case in mean time suspended.

D. H.

Witnesses: Andy Tims, Elias Ramsey, Andrew Kirkpatrick, Sam. Furguson, John Caldwell, Gadsden Steele, Mrs. Jim Williams, Hiram Littlejohn.

U. S. circuit court for So. Ca.

I, D. H , clerk of said court, do hereby certify that these seven sheets of paper, all in one handwriting, together with the endorsements, do contain a true copy of the indictment and findings now on file & recorded in proceedings of court.

Witness my hand & seal of said court at Columbia, the 22 Dec., 1871.

[SEAL.] DAN'L HORLBECK,
C. C. C. U. S. for S. C.

(Indorsement on cover:) No. 578. The United States, plaintiffs, vs. James William Avery, Robert Riggins, et al. Certificate of division. S. Carolina C. C. U. S. Filed 5th January, 1872.

THE ENFORCEMENT ACT OF MAY 31, 1870.

THE UNITED STATES,
vs.
JAMES WILLIAM AVERY, ET AL.

IN THE SUPREME COURT OF THE UNITED STATES, DEC. TERM, 1871.

BRIEF FOR DEFENDANTS.

This case is brought into this Court upon *a certificate of division of opinion* of the Judges of the Circuit Court of the United States, for the Fourth Circuit and District of South Carolina.

It appears from the transcript of the record, that on a motion made by the defendants in the said Circuit Court, to quash an indictment found against them in said Court, the Judges thereof were opposed or divided in opinion upon the following questions:

1. "Whether the Court has jurisdiction to inquire and find "whether the crime of murder has been committed, as set "forth and charged in the latter portions of the second and "fourth counts of said indictment, in order to ascertain the "measure of punishment to be affixed to the offences against "the United States charged in the former portions of the said "second and fourth counts."

2. "Whether the right to keep and bear arms is a right "granted and secured by the Constitution of the United States, "so as to support the third count of said indictment, and "render the offence therein charged, cognizable in this Court."

As to the first question which arose upon the *second* and *fourth* counts of the indictment:

The *second* count charges that the defendants at York county, South Carolina, did conspire, with intent to violate the first section of the act approved May 31, 1870, entitled "*An act to enforce the rights of the citizens of the United States*

to vote in the several States of the Union, and for other purposes," by unlawfully hindering divers male citizens of the United States, of African descent, above the age of twenty-one years, from exercising the right of voting, and not allowing them to vote at an election by the people, to be held on the third Wednesday of October, 1872, within the county, district and State aforesaid, contrary to the act of Congress and against the peace and dignity of the United States, and that the said defendants in the act of committing the offence aforesaid, in and upon one Jim. Williams, in the peace of God and the State of South Carolina, and feloniously and of their malice aforethought did make an assault and did strangle him with a rope, by means of which he instantly died; and so by the means aforesaid, said defendants feloniously and of their malice aforesaid, the said Jim. Williams, did kill and murder, "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State of South Carolina."

The *fourth* count first alleges that the defendants conspired with intent to injure and intimidate Jim. Williams, a citizen of the United States, "with intent to prevent his free exercise and enjoyment of a right granted and secured to him by the Constitution of the United States," to wit: the right to keep and "bear arms, contrary to the act of Congress in such case "made and provided, and against the peace and dignity of the "United States." This count then proceeds to set out the crime of murder committed upon said Jim. Williams, precisely as set out in the said second count.

The counsel for the United States rely upon the 7th section of the act of Congress, hereinbefore cited, to sustain the jurisdiction of the Circuit Court. It is in these words:

"That if in the act of violating any provision in either of "the two preceding sections, any other felony, crime or "misdemeanor shall be committed, the offender, on conviction "of such violation of said sections, shall be punished for the "same with such punishments as are attached to the said "felonies, crimes and misdemeanors by the laws of the State "in which the offence may be committed."

It will be seen that the 7th section only applies when a violation of some provision contained in the 5th or 6th sections is alleged and established. Clearly no violation of any provision of the 5th section is charged in either the second or fourth counts. Both these counts charge *a conspiracy*—one to violate the right of suffrage, the other to violate the right to

bear arms; but the 5th section contains no provision as to *a conspiracy* of any sort, and no conviction could be had under either of the two counts of a conspiracy to violate any provision of the 5th section.

We are, therefore, confined to the 6th section, and it must appear that these counts charge the violation of some one of its provisions. It is as follows:

"That if two or more persons shall band or conspire "together, or go in disguise upon the public highway, or upon "the premises of another, with intent to violate any provision "of this act, or to injure, oppress, threaten or intimidate any "citizen with intent to prevent his free exercise and enjoy- "ment of any right or privilege granted or secured to him by "the Constitution or laws of the United States, or because "of his having exercised the same, such persons shall be held "guilty of felony, and, on conviction thereof, shall be fined "or imprisoned, or both, at the discretion of the Court; the "fine not to exceed five thousand dollars, and the imprison- "ment not to exceed ten years—and shall, moreover, be "ineligible to and disabled from holding any office, or place "of honor, profit, or trust, created by the Constitution or "laws of the United States."

We maintain that there is no provision in this 6th section against such a conspiracy as is charged in the second count, or against such a conspiracy as is charged in the fourth count.

The conspiracy charged in the *second* count is to interfere with the right of suffrage. This right is nowhere mentioned in the 6th section. But it is claimed for the United States that although not mentioned, yet it must, by construction, be included under that clause punishing a conspiracy "to violate any provision of this act," and as the first section provides for the right of suffrage, that right is included in that clause, and is therefore punishable under the 7th section.

The answer to the claim is, that a conspiracy against the right of suffrage is specially provided for by the *fourth* section of the same act, which is as follows:

"That if any person, by force, bribery, threats, intimida- "tion, or other unlawful means, shall hinder, delay, prevent "or obstruct, or shall combine and confederate with others to "hinder, delay, prevent or obstruct any citizen from doing "any act required to be done to qualify him to vote, or from "voting at any election as aforesaid, such person shall for "every such offence forfeit and pay the sum of five hundred "dollars to the person aggrieved thereby, to be recovered by

"an action on the case, with full costs and such allowance for "counsel fees as the Court shall deem just, and shall also for "every such offence be guilty of a misdemeanor, and shall, on "conviction thereof, be fined not less than five hundred dol- "lars, or be imprisoned not less than one month, and not "more than one year, or both, at the discretion of the Court."

This section is directed to a particular thing, the right of voting, and provides the punishment for the unlawful interference with that right, either by an individual acting alone, or by conspiracy with others, and designates the offence as a misdemeanor, and limits the imprisonment to one year.

Now if the 6th section had, in express terms, provided for the same offence, there would be a direct repugnancy as to the grade of the offence, and the measure of punishment, and the Court would be obliged to say, as both would not stand, which of the two should prevail. My impression is, that in such a case, in favor of liberty, the rule is, that the section providing the lowest term of imprisonment must be adopted. It happens, however, that there is no express repugnancy between these sections, for the particular thing provided for expressly by the 4th section is no where mentioned in the 6th section. If that particular thing is brought within the purview of the 6th section, it must be brought there by implication or intendment. But this is not allowable. The true rule is, so to construe the law as that all its sections shall prevail. There is no difficulty in this instance to put such construction on these sections as that both may stand, the 4th as providing for conspiracies against the right of suffrage, and the 6th as extending to conspiracies against many other rights provided for in other sections of the act.

There is another rule of construction which aids us here: That where in one clause of a statute a particular thing is provided for, and in another clause there is a general provision, under which by intendment that particular thing might be embraced, the clause in which the particular thing is expressd must prevail. *Gregory's Case Reports*, p.

Smith's Commentaries on Statutory Construction, p. 766, Sec. 653.

Sedgwick on Statutory Law, p. 423, Sec. 423.

AS TO THE FOURTH COUNT.

This count, as has been shown, charges the subject matter against which the conspiracy was formed, to be "the right to

keep and bear arms," which right it is alleged was granted and secured by the Constitution of the United States.

The right "to keep and bear arms" is not enumerated in section six or any other section of the act, and if it can be brought within the purview of that section, it must be construed to be embraced under that clause which punishes a conspiracy to prevent the enjoyment or free exercise "of any right or privilege granted or secured by the Constitution or laws of the United States."

The right "to keep and bear arms" is not mentioned in the original Constitution, but first appears in the second article of the amendments. It is as follows:

"A well regulated militia being necessary to the security "of a free State, the right of the people to keep and bear "arms shall not be infringed."

This article contains no grant of power to the Federal Government over the right to keep and bear arms. On the contrary the established construction is, that it only recognizes a pre-existing right in the people of the State, and is merely a restriction upon the Federal Government against any interference with that right, and consequently a subject matter exclusively within the cognizance of the States.

Barron *vs.* The Mayor of Baltimore. 7 Peters, 343.

I do not deem it necessary to say more on the question whether the right to keep and bear arms, set up in the fourth count, is a right comprehended within the phrase used in the 6th section as a right or privilege "granted or secured by the Constitution or laws of the United States," nor has it been granted or secured by any law of Congress prior to the act of 1870.

To recur to the *second* count, which charges no overt act. If the Court should be of opinion that a provision as to the right of suffrage, is, by intendment, contained in the 6th section, we then contend that such provision does not give the Circuit Court jurisdiction over the crime of murder provided for in the 7th section, and this on several grounds:

1st. That, as has been shown, the indictment alleges ~~of a~~ violation of any provision of the *fifth* section, but if it alleges any violotion of either section it can only be the provision in the 6th section, under which the right of suffrage is said to be included by implication.

The offence of conspiracy so provided in that section is made complete without an overt act. The parties are guilty so soon as the conspiracy is formed, but not a moment before.

Undoubtedly an overt act in furtherance of the conspiracy may be proved as evidence to establish the fact of conspiracy. This of course must be an overt act *subsequent* to the conspiracy, from which a conspiracy to do that act may be inferred. Now this 7th section only provides for the second felony, upon conviction of the first felony provided for in the prior sections. That prior felony must, therefore, be complete. But as the prior felony is alleged to be a conspiracy complete in itself, on proof of the unlawful agreement, the 7th section cannot apply, because that section only applies to another felony committed, whilst the party charged *is in the act of violating the former section* and upon proof that he has violated it. It is impossible to apply these provisions to that provision of the 6th section which relates to the conspiracy against the suffrage. Whilst parties are in the act of forming a conspiracy, they are not engaged in the act of violating that provision. There is no provision in the 6th section providing for such an offence as a meeting with *intent* to conspire, but only for a conspiracy formed. There are provisions in the 5th and perhaps in the 6th sections to which the 7th section might apply; for instance, that clause of the 5th section which provides a punishment for hindering the exercise of the right of suffrage. Whilst the accused is engaged in effecting this hindrance he is in the act of violating the law, and such violation is complete; but this cannot be said of parties met together for the purpose of forming a conspiracy until after the conspiracy is agreed upon, for until then they cannot be said to conspire together.

Again, if we read the 6th section disjunctively and according to the letter, the *corpus delicti* is a mere conspiracy in the first clause, and the going in disguise on the public highway, with illegal intent, and entering upon the premises of another with an illegal intent, without a previous conspiracy, constitute the offence. If that be so, the parties so disguised, or so entering on the premises of another, are engaged in violating those provisions, and would come within the 7th section.

But I apprehend that the true construction of the 6th section requires its several clauses to be read conjunctively, so that the conspiracy clause must apply to them all. The literal reading is:

"That if two or more persons shall band and conspire "together, or go in disguise upon the public highway, or upon "the premises of another, with intent to violate any provision "of this act," &c.

It would seem that it should be read as follows: "That if two or more persons shall band and conspire together *to* go in disguise," &c.

The persussive argument in favor of this latter construction is, that it avoids repugnancy with the 4th section, and makes both sections harmonize. Leaving the 4th to operate upon conspiracies not embracing such aggravating circumstances, and the 6th section to cover such conspiracies as do embrace them, and thus explaining the reason why the first is called a misdemeanor, and the other a felony, and punished as such with more severity, this construction would take the conspiracy charged in this second count, which does not embrace the aggravating particulars, entirely out of the operation of the 6th section.

Thus far I have argued to show that there was no jurisdiction over the murder charged in the second count, *first*, because the conspiracy against the right of suffrage is not embraced in any of the provisions of the 5th and 6th sections. *Second.* If embraced in either, it must be in the 6th section, and then would not come within the terms of the 7th section until it became a conspiracy, and the parties would not be said to be engaged in the violation of any provision of the 6th section whilst they were talking or consulting about it, or before the conspiracy was fully formed, nor afterwards, unless the conspiracy is not complete without an *overt* act, which is not the character of the conspiracy charged in the second count, or provided for in the 6th section.

But if the Court should be against us on these points, and be of opinion that the *second* count does charge an offence which comes within the provision of the 6th section, and consequently within the 7th section, then I have next to object that the Circuit Court had no jurisdiction over the crime of murder charged in that count.

In the first place, that Court had no jurisdiction of it, as an offence at common law. It is settled law, that the criminal jurisdiction of the Federal Courts is wholly statutory, and they can take cognizance of no crime not provided for by act of Congress. *Vide Brightly, Federal Digest*, p. 201, for a reference to the cases on this point.

CONSTRUCTION OF THE SEVENTH SECTION.

The first question to be considered is, whether the seventh section does purport to confer jurisdiction over the crime of

murder committed under the circumstances charged in the indictment.

I understand it to be claimed for the United States that it does not purport to confer any jurisdiction over that crime, but only authorizes the Court to apply the punishment provided by the laws of the State for the crime of murder, and apply that measure of punishment on conviction of the offense against the right of suffrage, provided for in the sixth section. In other words, according to this construction, the Court has only to examine the statutes of South Carolina to inquire and find what degree of punishment they inflict on the crime of murder, for the purpose of applying it as a proper measure of punishment for the conspiracy against the suffrage in the 6th section.

Now, if we admit, *ex gratia*, that to a statutory offense created by Congress, it is allowable to fix the grade of punishment for its commission according to the grade provided for the same offense, or even for a different offense, by State legislation, this 7th section does not come within such a rule.

In the first place, as to the various offenses named in the 6th section, that section does provide its own measure of punishment for their violation, instead of referring to a State law for that important matter. There is consequently no ground upon which to refer to a State law to fix a rate of punishment expressly fixed by act of Congress.

In the second place, the language of the 7th section does not warrant such a construction. It only warrants the adoption of another grade of punishment fixed by State law for *another* felony than that specified in the 6th section, when in the words of the act, "any other felony, crime or misde- "meanor has been committed." The Court, therefore, has something more to do than "to inquire and find" what is the punishment fixed by State laws for that other felony, and that is to inquire and find that such other felony "has been committed." But to do this the Court must have jurisdiction to inquire and find this fact in the only allowable mode, that is upon indictment and plea of guilty, or verdict of a jury upon plea of not guilty.

This construction seems inevitable, and it is clear that it was followed by the prosecution, for we find that in framing the second count (as well as the fourth) they charge the conspiracy against the suffrage, and next the murder with all the averments necessary for charging and proving each offense.

I conclude therefore, that the 7th section does purport to

confer jurisdiction over the offense of murder as charged in the indictment.

AS TO THE JURISDICTION.

We maintain that the jurisdiction so attempted to be given by the 7th section over the "other felony"—in this case the crime of murder—belongs exclusively to the courts of South Carolina, and that consequently this section is unconstitutional and void, as an exercise of a legislative power not in pursuance of the federal constitution.

I.

The 6th section, as is claimed by the prosecution, chargse one felony, to-wit: a conspiracy against the suffrage and the *corpus delicti* consists in the conspiracy alone. The unlawful agreement completes the offence, and no overt act is mentioned or required.

The 7th section provides for another and different felony. The very words are, "any other felony, crime or misdemeanor." That is, any felony other than the felony against the suffrage. It is not put as a felony committed *in pursuance* of the felony against the suffrage, or as *an overt act* in carrying that suffrage conspiracy into effect, not at all; for then it would form *a part* of that felony, but it is put as a different and distinct felony. Nor is it put as a case of merger of the felony of conspiracy into the higher felony of murder, but each felony is to be kept distinct on the trial, and there must be a separate conviction of the felony conspiracy, and then, and only then, a conviction of the murder.

It is claimed on the part of the United States that as by the terms of the 7th section the punishment for murder under the State law is only applicable to the conspiracy against the suffrage, and as the sentence or judgment to be given by the Circuit Court can only be given upon conviction of the conspiracy, that Court can not properly be said to take jurisdiction of the murder; in other words, the murderer is not to be hung under the State law, but under the Federal law. The obvious answer is, that the punishment for murder can not be applied to the conspiracy upon conviction of the conspiracy alone; another most important matter must concur, and that is a trial and conviction *for the murder* before the same Court, and how that can be accomplished by a Court having no jurisdiction to try or convict, passes my comprehension.

II.

Finally, if the Court should be of opinion that the jurisdiction over the murder is merely ancillary to the jurisdiction over the conspiracy, and that the jurisdiction to try the murder simply depends upon the jurisdiction to try the conspiracy, we then contend that the Circuit Court had no jurisdiction to try under the 6th or any other section of the act of 1870, the conspiracy against the suffrage charged in the second count of the indictment. Let us again admit, for the purposes of the argument, that such a conspiracy as is charged in the second count comes within the purview of the 6th section.

What then is the nature of the conspiracy charged in the second count? It is to hinder and prevent divers male citizens of the United States of African descent above the age of twenty one years from exercising the right of voting, and not allowing them to vote at an election by the people to be held on the third Wednesday of October, 1872, within the county, district and State aforesaid, and in violation of the first section of the act of May 21, 1870.

No one pretends that the offence so charged was provided for by any act of Congress prior to 1870, but it is claimed by the prosecution that the authority to create the offence was vested in Congress under the fifteenth article of the amendments of the Constitution.

That article is in the following words:

"SEC. 2. The right of citizens of the United States to "vote shall not be denied or abridged by the United States or "by any State on account of race, color or previous condition "of servitude.

"SEC. 2. The Congress shall have power to enforce this "article by appropriate legislation."

It is clear that this amendment contains no grant of power to the United States or to the States over the right of suffrage, but is in the nature of a restriction or abridgement of such power in one respect only, and that is in the power to discriminate on account of race, color or previous condition of servitude. It is to enforce that section and prevent such discrimination that by the second section Congress is authorized to enact appropriate laws.

It is first to be noted that this article of the Constitution applies as well *inhibition* to the United States as to the States. It contemplates only legislative action, and does not expressly extend to individual action. So far as the States are con-

cerned it might be stated in equivalent language as follows: "The right of citizens of the United States to vote shall not "be denied or abridged by any State on account of race, color "or previous condition of servitude." Suppose that in analogy to other prohibitions upon the States, for instance, the prohibition against the passage by a State of an act to impair the obligation of contracts, it were allowable to Congress to enforce the amendment by legislation to prevent such discrimination by individual action. Before such legislation could take effect must it not appear that the State *has* authorized such discrimination, and that such discrimination is attempted to be carried out by an individual? If the State has not violated this article, and has passed no act to authorize such discrimination, can the unauthorized act of an individual or a combination of individuals make a case for federal cognizance? In the instance put, of a violation of rights secured by contract, can a case arise for federal cognizance until the forbidden law has first been enacted? Certainly not. The violation of the obligation of contracts can not be enforced by the federal authority against individuals where no law of the State has authorized such violation.

It seems that the very subject matter necessarily requires this construction. How can an individual deny or abridge the right to vote in the sense of this amendment? It is a right that can only be given by law, or be denied or abridged by law. South Carolina has not violated the amendment; she has passed no act to discriminate on account of color, race or previous condition, but admits citizens of all colors, races or previous conditions of servitude who have the qualifications of voters to the full enjoyment of the right of suffrage.

But if it be held that it would be appropriate legislation to enforce this amendment against individual interference in a State where no act had been passed on the subject matter, then next we contend that the conspiracies set up in the two counts, whether founded upon the 5th and 6th or even the 4th section of the act of 1870, are not within the jurisdiction of the Circuit Court, because *those sections provide for offences which are not within the purview of the amendment, nor appropriate legislation to enforce the amendment, and are therefore void.*

It is too clear for argument that within the legitimate sphere of the rights reserved to the States is included the right of exclusive legislation in the matter of suffrage. It is difficult to imagine a right more essential to the very constitution and preservation of the State government. The qualification of

voters and of elective officers, the times, places and manner of exercising the franchise, and its preservation from interference or abuse, all belonged to the States existing at the adoption of the Constitution, and the same rights and powers are guaranteed to the States since created. When, therefore, in any particular, a federal jurisdiction is claimed in respect to the suffrage, it must be made to appear that it has been given or surrendered by the States to that jurisdiction.

Looking then through the Constitution as originally framed and the amendments, we find no general surrender of the right, but do find such surrender in some particulars; and first in the original Constitution: In the matter of the election of electors of the President and Vice President, and of Senators and Representatives to the Congress. As to the electors of President and Vice President, it is provided that they shall vote in their respective States by ballot, that the time of choosing them and the day on which they shall vote shall be determined by Congress, that no Senator or Representative in Congress, or person holding an office of trust or profit under the United States shall be appointed an elector, and that each State shall appoint these electors in such manner as the Legislature thereof may direct, and in number equal to the whole number of Senators and Representatives to which the State may be entitled in Congress.

As to Senators and Representatives to Congress, certain qualifications as to age, citizenship and residence are provided, and that "the times, places and manner of holding elections "for Senators and Representatives shall be prescribed in each "State by the Legislature thereof, but the Congress may at "any time by law make or alter such regulations, except as "to the place of choosing Senators."

It is clear that these provisions are confined to public offices of the United States, and prescribe certain qualifications for those officers, but as to members of the House of Representatives it is provided that only such persons shall be entitled to vote for them as have the qualifications to vote for members of the most numerous branch of the State Legislature.

It has been suggested that under these provisions a general power is vested in Congress over the election of these officers under the authority so given to make or alter such regulations as the States may have prescribed in respect to the times, places and manner of holding such elections. This federal power is too strictly limited to be extended beyond the letter. It is obvious that the regulating power over times and places

would not authorize such legislation as is now in question. And as to the regulating power over *the manner*, it has always been understood as relating to a choice between voting by ballot or *viva voce*, or by general ticket, or single or double districts, or by a majority vote as in some States, or a plurality as in others.

1 Story on the Constitution, sec. 286, p. 573.

There are sections in the act of 1870 having special reference to elections for members of the House of Representatives, to-wit, the 19th, 20th and 21st sections, which, in effect, provide a criminal code for such elections. No question arises in this case under these sections. They only provide for overt acts, and not for any conspiracy to commit those acts, and are limited as to punishment to a fine not exceeding $500, and imprisonment not exceeding three years, and neither by direct enactment or by reference to other sections do they purport to give any jurisdiction to try or punish the offender for any other felony or crime than those therein specified.

We are therefore under no necessity, in this case, to discuss the constitutional power of Congress to provide for and punish the offences created by those sections; therefore what we have said and what we shall have to say in reference to the power to give a jurisdiction over the offence of murder, under the 7th section, will incidentally apply to them.

Having shown that the jurisdiction over the crime of murder, so attempted to be given in the 7th section, is not warranted by the original constitution, the question is narrowed to the 15th Amendment. That amendment, as we have argued, is confined to one matter alone, and that is to discrimination on account of color, race or previous condition in the elective franchise—and simply forbids such discrimination.

Again, proceeding upon the admission *exgratia*, that this prohibition may be enforced by penal enactment to punish individuals for violating the prohibition, we maintain that the offences provided for in the 5th and 6th sections do not come within that category. There is not a clause in either section that provides for any obstruction or denial of the right of suffrage *on the ground of race, color or previous condition* of the person so obstructed. The 5th section is the only one that refers to the suffrage, and that provides for direct interference with the right of suffrage generally, whilst in the 6th section the right of suffrage is nowhere so much as mentioned. There is no provision in either section 4th, 5th or 6th against inter-

fering with the right of suffrage *because* of the race, color or previous condition of the party.

It will appear, on a careful examination of the Act of May 21, 1870, that there is not a single offence defined in it which comes within the provisions of the 15th Amendment.

The 1st section declares that all citizens of the United States, otherwise qualified to vote, shall be allowed to vote in any State, county or other civil subdivision, without distinction of race, color or previous condition of servitude, "any "constitution, law, custom, usage or regulation of any State or "Territory, or by or under its authority, to the contrary notwithstanding."

This section defines no offence, but simply interdicts discrimination against the suffrage on the ground of race, color or previous condition of servitude, *by a State or under its authority*.

The 2d section defines an official offence. It provides that whereby the laws of any State some act is required to be done as a qaulification or prerequisite for voting, the officers of the State, charged with that duty, "shall give to all citizens of the United States, the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color or previous condition of servitude" under certain penalties of fine and imprisonment provided in the section.

Now, although the prohibited discrimination declared by the fifteenth amendment, and the 1st section, is here referred to, the official offence has no special reference to that discrimination. It is not provided that the refusal of the officer must be on *that* ground. On the contrary, *that* is no way essential to the *corpus delicti*. The language of the section covers every case of official delinquency in wrongfully refusing the performance of the requisite act—that is of *any* requisite act—to all persons of whatever race, color or previous condition. If, for instance, the prerequisite to the right to vote happens to be Registration and the Board of Registry refuse to register the applicant wrongfully on the ground of *residence*, the offence is complete. And so as *to age* or *freehold estate*, the refusal of registry for the want of these qualifications is covered by the 2nd section.

The 3rd section also provides for official misconduct. It declares that if the offer of any citizen to perform the act required as a prerequisite to vote, shall be wrongfully denied, such offer shall be declared a performance in law of such act and

such person, being otherwise qualified, shall have the right to vote, and punishes the officers who wrongfully reject such vote, with fine and imprisonment.

The 4th section provides for offences committed by persons, not acting in any official capacity, either individually or in combination, to hinder or obstruct by force, bribery, intimidation or other unlawful means, "any citizen from doing any act required to be done to qualify him to vote or from voting as aforesaid at any election as aforesaid;" and for such offence gives a forfeiture of $500 to the party aggrieved, and provides a punishment by fine and imprisonment.

There is not a word in this section which confines the offence to the matter of interference on account of the color, race, or previous condition of the party whose right to qualify or to vote is so interfered with. Wrongfully to prevent or hinder any person, at any election, on any ground, or without any ground, from the free exercise of the right of suffrage, is the clear, scope and meaning of this section. When to this we add the provision found in the 8th section of this act, the unconstitutionality of this legislation becomes still more apparent. That section provides,

"That the District Courts of the United States, within "their respective Districts, shall have, exclusively of the "Courts of the several States, cognizance of all crimes and "offences committed against the provisions of this act, and "also concurrently with the Circuit Courts, of all causes, "civil and criminal, arising under this act, except as herein "otherwise provided."

It will be found that in all the twenty-three sections of this act, and with respect to all the offences which they create, *exclusive* jurisdiction over their prosecution and enforcement is vested in the Federal Courts; and only one of them, the twenty-third, allows any jurisdiction to the State Courts, and that is *concurrently* with the Federal Courts in *an action* to recover possession of an office under a State, to determine the right to the office "by reason of the denial of the right guaranteed by the fifteenth amendment."

When the States surrendered, by the fifteenth amendment, the right to discriminate in the matter of the suffrage on the ground of color, race or previous condition of their citizens, and authorized Congress to enforce that amendment, they surrendered no other right touching the suffrage and gave Congress no further power over that subject. They gave to Congress full power to protect the right thus surrendered, but

gave no power to Congress to interfere in any way with any other power touching the suffrage, not surrendered, not even with the power to discriminate on any other ground, as in the matter of property qualification, or it may be, with educational qualification. If a State should discriminate against the landless by a freehold qualification, or against the ignorant by an educational test, nothing short of another amendment to prevent such discriminations would give Congress any right of interferonce.

How then can it be claimed that under the guise of appropriate legislation to enforce the special provision as to discrimination of one special character, Congress may pass such laws as this enforcement act of 1870?

Giving the largest latitude to Congressional discretion in the matter of choice as to appropriate legislation, there are obvious limitations upon its exercise. To carry out one granted power it is not allowable to usurp another power not granted. If the means adopted by Congress will accomplish the constitutional end, if the law will effect the purpose to be attained, and if at the same time the means so adopted, or the law so passed, necessarily invade or frustrate other subject matter never granted to the federal authority but belonging exclusively to the States, such means are not, in the constitutional sense, appropriate. You can not, under this pretense, according to Mr. Hamilton, "abridge a pre-existing right of any State."

The Chief Justice in *McCullough* vs. *Maryland* puts the true doctrine on this subject in a clear light:

"Should Congress in the exercise of its powers, adopt "measures which are prohibited by the Constitution; or "should Congress, under the pretext of executing its powers, "pass laws for the accomplishment of objects not intrusted "to the government, it would become the painful duty of "this tribunal, should a case requiring such a decision come "before it, to say that such an act was not the law of the "land."

HENRY STANBERY,

Counsel for Defendants.

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HENRY STANBERY,

Counsel for Defendants.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES
vs.
JAMES WILLIAM AVERY AND OTHERS. } No. 578.

On a certificate of division in opinion between the judges of the Circuit Court of the United States for the district of South Carolina.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

The defendants in this case were indicted for conspiracy under the act of May 31, 1870, entitled "An act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes." (16 Stat., 140.)

Counsel for the defendant, Riggins, having moved the court to quash the indictment, after argument upon the motion, the following questions occurred:

"1. Whether the court has jurisdiction to inquire and find whether the crime of murder has been committed, as set forth and charged, in the latter portions of the second and fourth counts of said indictment, in order to ascertain the measure of punishment to be affixed to the offences against the United States, charged in the former portions of the said second and fourth counts.

"2. Whether the right to keep and bear arms is a right granted and secured by the Constitution of the

United States, so as to support the third count of said indictment, and render the offence therein charged cognizable in this court."

On which questions the opinions of the judges were opposed.

The counts designated in those questions are as follows:

SECOND COUNT.

"At a stated term of the circuit court of the United States, begun and holden at Columbia, in said district, on the fourth Monday of November, A. D. 1871, the grand jurors of the United States, in and for said district, upon their several and respective corporal oaths, do present, that James William Avery, &c., together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, late of York county, in the State of South Carolina, at York county, in said district, and within the jurisdiction of this court, on the 6th day of March, A. D. 1871, unlawfully did conspire together with intent to violate the first section of the act entitled 'An act to enforce the right of the citizens of the United States to vote in the several States of this Union, and for other purposes,' approved May 31, 1870, by unlawfully hindering, preventing, and restraining divers male citizens of the United States of African descent, above the age of 21 years, qualified to vote at any election by the people in said county, district, and State, from exercising the right and privilege of voting, and by other unlawful means not allowing them, the said male citizens, to vote at an election by the people, to be held on the third Wednesday of October, A. D. 1872, within the county, district, and State aforesaid, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said James William Avery, &c., and others to the jurors aforesaid unknown, on the day and year aforesaid, at the county and district afore-

said, and within the jurisdiction of this court, *in the act of committing the offence aforesaid*, as aforesaid set forth and alleged, in and upon one Jim Williams, *alias* Jim Rainey, in the peace of God and the State of South Carolina then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and the said James William Avery, &c., and others, to the jurors aforesaid unknown, a certain rope about the neck of the said Jim Williams, *alias* Jim Rainey, then and there feloniously, wilfully, and of their malice aforethought, did fix, tie, and fasten; and that the said James William Avery, &c., and others, to the jurors aforesaid unknown, with the rope aforesaid so as aforesaid fastened on and about the neck of him the said Jim Williams, *alias* Jim Rainey, then and there feloniously, wilfully, and of their malice aforethought, did choke, suffocate, and strangle, of which said choking, suffocating, and strangling he, the said Jim Williams, *alias* Jim Rainey, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said James William Avery, &c., and others to the jurors aforesaid unknown, him, the said Jim Williams, *alias* Jim Rainey, then and there, in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Carolina."

THIRD COUNT.

[Same as the first paragraph of the second count down to and including the words "unlawfully did conspire together with intent;" after which it reads as follows:] "to injure, oppress, threaten, and intimidate Jim Williams, *alias* Jim Rainey, a citizen of the United States, with intent to prevent and hinder his free exercise and enjoyment of a right and privilege granted and secured to him by the Constitution of the United States, to wit, the right to keep and bear arms, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States."

FOURTH COUNT.

[This count contains two paragraphs, the first of which is the same as the third count, and the other corresponds exactly with the last paragraph of the second count."]

The following are the provisions of the act of May 31, 1870, under which the said counts were drawn:

"SEC. 6. *And be it further enacted*, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and on conviction thereof shall be fined or imprisoned, or both, at the discretion of the court, the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years, and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

"SEC. 7. *And be it further enacted*, That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed."

I.

The questions certified in this case having arisen upon a *motion to quash* the several counts of the indictment therein mentioned, this court cannot take cogni-

zance of the same, such motion being preliminary in its character and determinable by the court below as a matter of pure discretion.

United States *vs.* Rosenburgh, 7 Wall., 580.

II.

The first of these questions is directed exclusively to the "*latter* portions" of the second and fourth counts of the indictment, and submits no point in relation to the "*former* portions" of the same counts on which a division of opinion exists.

The former portion of each of the counts sets out an offence declared in the 6th section of the act of 1870, quoted above; that of the second count, charging a conspiracy under the provision of said section which makes it a felony if two or more persons shall conspire together "with intent to violate any provision of this act;" and that of the fourth count, charging a conspiracy under the provision of the same section, which makes it a felony if two or more persons shall conspire together "to injure, oppress, threaten, or intimidate any citizen with intent to prevent his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution," &c. As already intimated, there is no point presented in the first question respecting either of the offences charged in the portions of the second and fourth counts just adverted to; and, so far as *that question* is concerned, the offences there charged must be regarded as if no opposition in opinion existed between the judges concerning them.

The only subject on which a division of opinion is

certified, and the only subject therefore for consideration here, in connection with the first question, is, what appertains to the latter portion of each of the counts referred to, which, it will be observed, is based upon the 7th section of the act of 1870, hereinbefore quoted.

That section does not create any new offence, but simply declares what shall be the measure of punishment for such offences as are already created by the two preceding sections of the act, if, while committing any of those offences, the offender shall also commit "any other felony, crime, or misdemeanor." The "other felony or misdemeanor" there contemplated is obviously a crime against the laws of the State where any of the offences referred to may be committed. But it is not to be understood as constituting an ingredient of those offences. It forms nothing more than an aggravating circumstance, extrinsic to and independent of the offences themselves, but which is allowed an influence in determining the penalty to be inflicted therefor.

So that, upon this view of the import of the first question and of the nature of the provisions of the said 7th section, the main inquiry which the former appears to suggest is, whether Congress may, in providing punishment for offences against laws of the United States, treat as matters of aggravation crimes perpetrated against State laws contemporaneously with the commission of those offences, and regulate the penalty accordingly.

Viewing the crime against the State, in the case supposed, as a *fact* only, separate and distinct from the

offence against the United States, we are not aware o any valid objection against the power of Congress to take the former into account in fixing the punishment for the latter. The principle involved is precisely the same as where the fact of the conviction of a previous offence is taken into account in prescribing the penalty for a subsequent violation of the law; and instances where this has been done are not unknown to our legislation, either Federal or State.

Thus the 22d section of the act of March 3, 1825, (4 Stat., 108,) which punishes the offence of robbing the mail, declares, "that if any person shall rob any carrier of the mail of the United States, or other person intrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not less than five years, nor exceeding ten years; and, if convicted a second time of a like offence, he or they shall suffer death." See also the act of March 2, 1831, for the punishment of crimes in the District of Columbia, (4 Stat., 448.)

So by the criminal code of Pennsylvania if any person who has been convicted of any offence (other than murder of the second degree) for which the punishment prescribed is imprisonment by separate or soli tary confinement at labor, shall, after such conviction, be guilty of a similar offence, or of any offence for which such punishment is directed, he shall in either case, upon conviction, be sentenced to undergo an imprisonment and be kept at labor not exceeding double the whole period of time which may be prescribed for the crime of which he is convicted. (Purdon's Digest, edition of 1857, page 1369, par. 182.)

Similar provisions are found in the penal laws of Massachusetts. (See General Statutes of 1860, page 798, sec. 22.)

The criminal statutes of Michigan contain the following:

"When any person shall be convicted of any offence, and shall be duly sentenced therefor to confinement in the State prison of this State, for one year or more, and it shall be alleged in the indictment on which such conviction is had, and admitted or proved on the trial, that the convict has before been sentenced to a like punishment *by any court in this State, or in any other of the United States*, for a period not less than one year, he shall be sentenced to be punished by imprisonment in the State prison not more than seven years, in addition to the punishment prescribed by law for the offence of which he shall then be convicted."—(Revised Statutes of 1846, page 688. sec. 12.)

So, by the criminal code of Virginia, it is provided that, "when any person is convicted of an offence, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted or by the jury found, that he had been before sentenced *in the United States* to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced."—(Acts 1847–'48, page 123, sec. 13.)

The policy of this legislation is to visit with increased punishment offenders who shall be convicted and sentenced for crimes committed after having been once or oftener convicted and sentenced for offending against the laws. But the increased punishment, in legal con-

templation, is attached to the last offence committed, not to the first, and it is rendered more severe in consequence of the situation into which the party had previously brought himself. (See Ross's case, 2 Pick., 165; Plumbly *vs.* Commonwealth, 2 Met., 413.)

Now, the difference between taking into account the conviction of a past offence, with a view to fix the punishment for a subsequent one, and taking into account the commission of an offence with a view to fix the punishment of another offence contemporaneously committed, considered merely as *facts* constituting matter of aggravation, is only a difference of time, and is wholly immaterial. In neither case is the punishment, in contemplation of law, applied to the offence the conviction or commission is regarded as an aggravating circumstance simply. Unquestionably, then, Congress can visit with increased punishment offenders against the laws of the United States who, in the act of violating those laws, shall also commit offences against the laws of the States.

If Congress has the power to increase the punishment of an offence against the United States committed within the body of a State, when accompanied by homicide, (and from what we have already submitted it would seem that Congress possesses this power,) it necessarily follows that the courts of the United States must have jurisdiction to inquire into this additional fact. It is no answer to say that in so doing they take jurisdiction of an offence against the State laws, and of which Congress cannot give them jurisdiction. The

court merely admits evidence of a fact, as matter of aggravation of another offence.

III.

The second question is, whether the right to bear arms is a right guaranteed by the Constitution within the meaning of the act of May 31, 1870.

It is argued, on the part of the defendants, that the first ten amendments to the Constitution are limitations on Federal and not on State power.

Barron *vs.* Mayor, &c., of Baltimore, 7 Pet., 243.

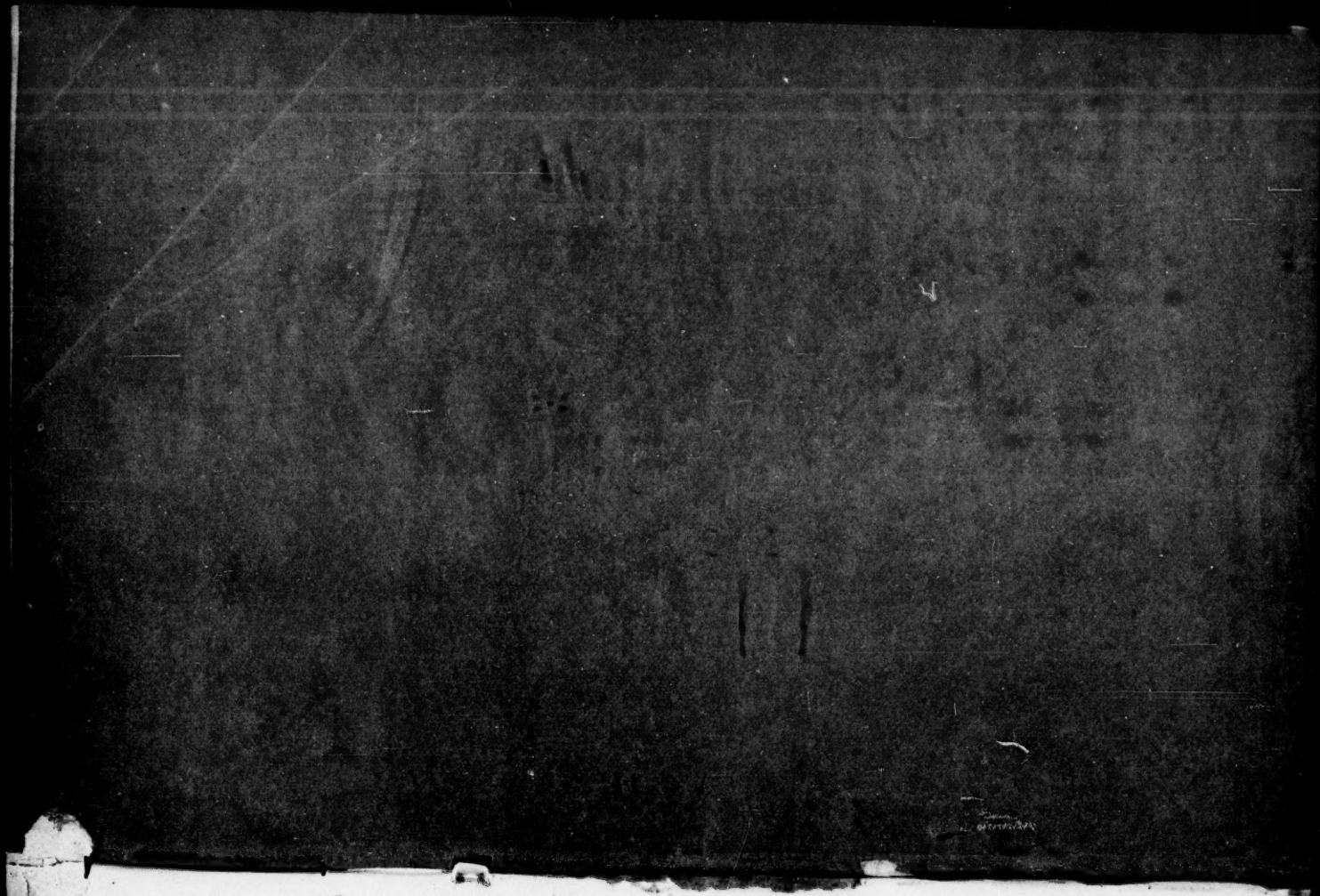
But the question does not now arise, and is immaterial for the present discussion, whether a State can deprive her subjects of the right to bear arms. The question is, whether if a lawless mob intimidates an entire district so far as to deprive the inhabitants of this right, it is depriving them of a right guaranteed by the Constitution within the meaning of this act.

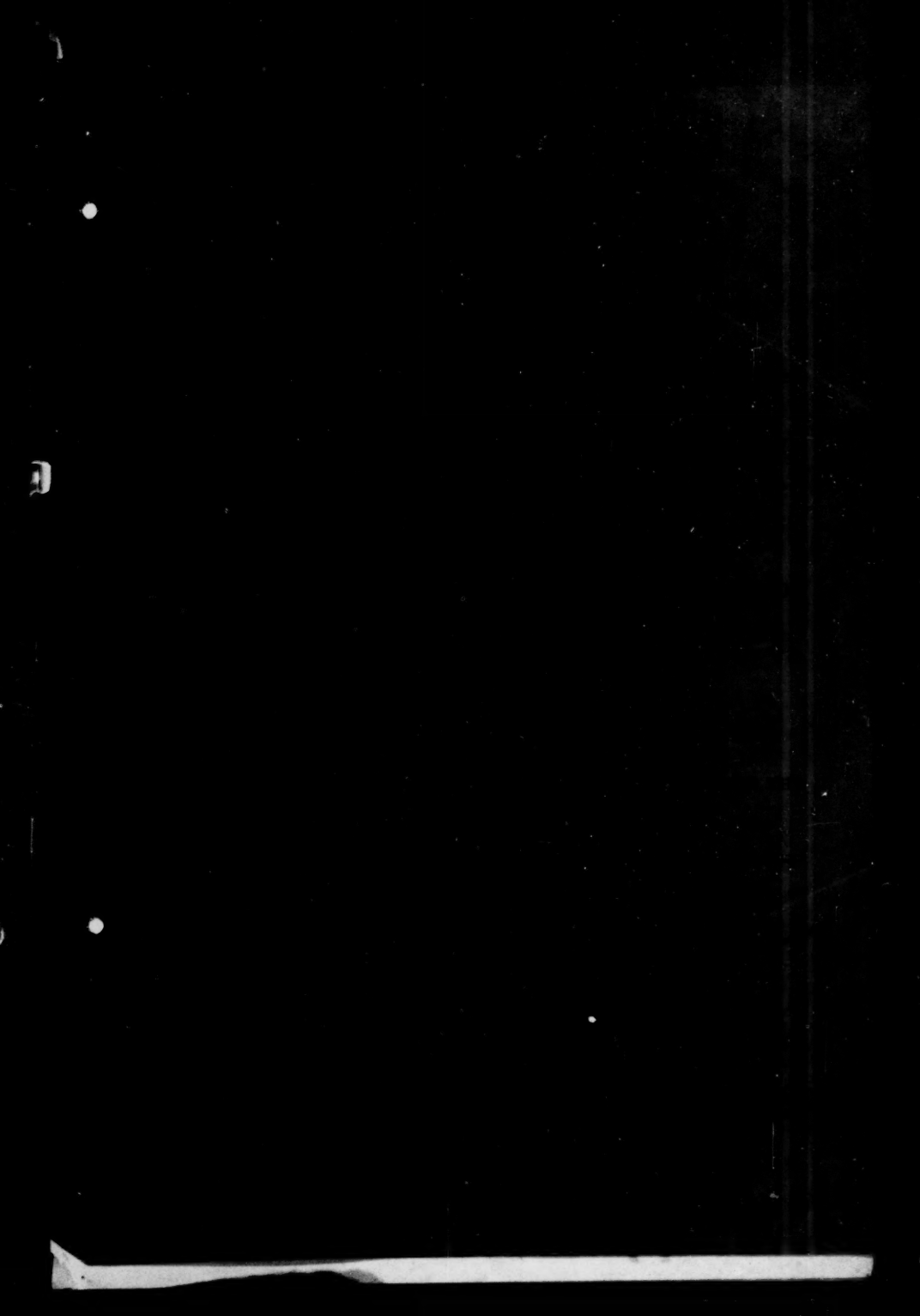
The main purpose of the second amendment is stated in the amendment itself. It is because a well-ordered militia is necessary to the security of a free State. The enjoyment of the right is therefore a matter in which the Federal Government is interested equally with the State governments. Ordinarily such an interest might be too vague and indirect to give Congress power to legislate for its protection by punishing offences committed against such a right within the limits of States. But in regard to the right to bear arms, the United States, by reason of the power given to Congress "to provide for organizing, arming, and disciplining the militia," has a direct interest in seeing

that the right which the Constitution itself declares to be essential to a well-ordered militia, is not infringed by unlawful authority, and, in the absence of State legislation, to punish violations of the right. And it is but a reasonable construction of the act of 1871 to construe it as applying to this right as well as to any other.

GEORGE H. WILLIAMS,
Attorney General.

C. H. HILL,
Assistant Attorney General.





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